IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4087 OF 1988

1. Shiva Ragho Kumbhar, since deceased, by his heirs :

A) Smt.Vithabai Shiva Kumbhar;

B) Pandurang Shiva Kumbhar;

C) Banda Shiva Kumbhar;

D) Sou.Jijabai Tukaram Kumbhar;

E) Sou.Ambubai Dinkar Kumbhar;

F) Sou.Shalubai Kundlik Kumbhar;

G) Suman Chandrakant Avekar;

2. Ishwara Ragho Kumbhar, since deceased, by his heirs :

A) Smt.Parvati Ishwara Kumbhar;

B) Shankar Ishwara Kumbhar;

C) Pandurang Ishwara Kumbhar;

D) Hindurao Ishwara Kumbhar;

E) Sou.Balabai Vithal Kumbhar ... Petitioners

versus

Kalyan Krishnaji Kurne ... Respondent

...

Mr. S.V. Sadavarte, for the Petitioners.

Mr. K.Y. Mandlik, for the Respondent.

...

CORAM : A.M.KHANWILKAR,J.

18th June 2004

ORAL JUDGMENT :

01. This petition takes exception to the judgment and order passed by the Additional Commissioner, Pune Division, Pune dated June 3, 1988 in Revision No. TNC.RA.121.86. Briefly stated, the lands in question are Gut No. 1692 admeasuring 1 hectare 29 ares, Gut No. 1719 admeasuring 0 hectare 75 ares and Gut No. 217 admeasuring 1 hectare 31 ares, situated at Kapileshwar, Taluka Radhanagari, District Kolhapur. The Respondent claims to be landlord in respect of the suit lands. It is not in dispute that the Petitioners' predecessor was

tenant in the suit lands prior to 1st April 1957. It is also not in dispute that the suit lands were originally held by Krishna, father of the present Respondent as joint family property. On 29th October 1956, an agreement was arrived at between family members of said Krishna and his seven sons, which was reduced into writing, purported to be partition deed, in which the suit lands were given to the share of the Respondent. The Respondent was at the relevant time in Military services. He retired from Military services on November 1, 1979, whereafter he gave notice of termination of tenancy and to hand over possession of the suit lands for personal cultivation. The tenant resisted the said demand notice. The Respondent thereafter filed application under section 43-1B of the Act on 29th June 1981 for possession of the suit land for personal cultivation being a certificated landlord. The said application has been allowed by the Assistant Collector by judgment and order dated January 31, 1986. The Petitioners carried the matter in revision before the Additional Commissioner, who, in turn, dismissed the revision affirming the decision of the Assistant

Collector by judgment and order dated June 3, 1988. Against these concurrent decisions, present writ petition has been filed.

02. It is relevant to note that before the authorities below the case of the tenant was that the purported partition was effected only to extricate the lands from application of statutory purchase by the tenant on the Tillers' Day. It was contended that the partition was not in conformity with the requirements of the provisions of the Tenantcy Act and had to be ignored so as to hold that the lands belonged to the joint family property and no relief can be granted to the Respondent under the provisions of section 43-1B of the Act. This plea has been negatived by both the authorities below on the reasoning that the purported partition was effected on 29th October 1956, whereas Chapter III-AA came to be introduced only in the year 1964 and it is presumptuous to assume that the partition effected in 1956 was with intent to avail benefit of said amended provision. In other words, authorities below proceeded to hold

that the partition cannot be questioned and for which reason allowed the application preferred by the Respondent under section 43-1B of the Act.

03. After considering the rival submissions, to my mind, both the authorities below have committed manifest error. It is rightly argued on behalf of the Petitioners that the exercise expected from the authority during the inquiry under section 43-1B of the Act has not been undertaken as was required by the exposition of the Apex Court in Balkrishna Somnath v. Sada Devram Koli, reported in A.I.R. 1977 S.C. 894. Indeed, the said Supreme Court decision deals with the purport of section 32F(1)(a) of the Act. However, the said provision is analogous to section 43-1B(1)(b) of the Act. Besides, it is rightly contended on behalf of the Petitioners that the requirement of proviso to section 32F(1)(a) was fully applicable in the present case, because when the purported partition was effected on 29th October 1956, the mandate thereof applied to the serving members of the Armed forces. In para 13 of the reported

decision, the Apex Court has observed thus :

> " The Proviso clearly states that the disabled person's share 'in the joint family' must have been 'separated by metes and bounds'. Separation from the joint family means separation from all the joint family assets. Otherwise the sharer remains partly joint and, to that extent, is not separate from the joint family. Notional division or division in status also may not be enough because the Act insists on separation 'by metes and bounds'. Ordinarily 'metes and bounds' are appropriate to real property, meaning, as the phrase does, 'the boundary lines of land, with their terminal points and angles'. In the context, the thrust of the expression is that the division must be more than notional but actual, concrete, clearly demarcated. The ineptness and involved structure and some ambiguity notwithstanding, the sense of the sentence is clear.

The share of a person in the joint family, plainly understood, means his share in all the joint family properties and not merely in the real estate part. What is more, the section uses the expression 'the share of such person in the joint family', 'the share of such person in the land', 'the share of that person in the entire joint family property'. Thus it is reasonable to hold that when the expression used is 'the share of such person in the joint family', it is not confined to the share in the land only. It really means his share 'in the entire joint family property'. Moreover, the statutory exercise expected of the Mamlatdar by the Proviso involves an enquiry into the share of the disabled person in the land, and its value, the share of that person in the entire joint family property, the proportion that allotment of the land bears to his share in the entire joint family property with a view to see that

> there is no unfair manoeuvre to defeat the scheme of the Act. The necessary postulate is that there is a division in the entire joint family property. Therefore, the imperative condition for the operation of the Proviso is that there should be a total separation and so far as a disabled member is concerned it must cover all the joint family properties."

In the present case, however, none of the authorities below have adjudicated the issue as to whether the share of the Respondent in the entire joint family property, the proportion that the allotment of the land bears to his share in the entire joint family property is or is not with a view to see that there is no unfair manoeuvre to defeat the scheme of the Act. This adjudication is necessitated, because, as mentioned earlier, the purported partition was admittedly effected on 29th October 1956 and if the said document is to be ignored in the light of the observations made by the Apex Court, then it would necessarily follow that on the Tillers'

Day, i.e., 1st April 1957, the tenant had become deemed purchaser by operation of law and the authorities would be instead obliged to initiate proceedings under section 32G of the Act. However, in case it was to be found that the purported partition was not to subvert the operation of section 32 read with section 32-G of the Act, in that case, the tenant will not be entitled to purchase the land on the Tillers' Day as by operation of section 32F, as it originally stood at the relevant time, the Tillers' Day stood postponed and by subsequent amendment of 1964, the same position would prevail. In the present case, the Respondent has exercised his right under the subsequent amended provision, Section 43-1B, immediately after retiring from the Military services by instituting application under that section. Accordingly, the Respondent would be entitled for the relief subject to satisfying the authority that the said partition was in conformity with the requirements of the Tenancy Act in that it was fair and not manoeuvred to defeat the scheme of the Act or to deprive the tenant of his statutory right of purchase on the Tillers' Day. The authorities

will examine that issue in the light of the observations of the Apex Court in para 13 reproduced above and record a clear finding to that effect.

04. In the circumstances, this Court has no option, but to relegate the parties to the Assistant Collector for inquiring into the issue as to whether the purported partition was fair and in conformity with the statutory requirement. The authority to decide the issue after giving both the parties fair opportunity to adduce further evidence, if any. The application be finally disposed of as expeditiously as possible preferably within six months from the date of receipt of writ of this Court. It is made clear that all questions regarding the genuineness or otherwise of the purported partition are left open.

05. In the result, both the orders are set aside and the matter is restored to the file of the Assistant Collector for considering the matter afresh in the light of the observations made above.

06. Petition allowed, with no order as to costs. Rule made absolute.

07. All concerned to act on the copy of this order duly authenticated by the Court Stenographer of this Court.

jg.92 (A.M.KHANWILKAR,J.)